86-236

No.

Supreme Court, U.S.
FILED
AUG 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

In the Matter of Antonio Mareno,

Appellant,

vs.

Lillian Roberts, as Commissioner of Labor,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT-- STATE CIVIL CASE

ANTONIO MARENO
Appellant Pro Se
3505 Tulip Drive
Yorktown Heights, N.Y. 10598
(914) 245- 7582

3/1PP

QUESTION PRESENTED

Whether the order dismissing sua sponte for untimeliness Appellant's appeal from an interim appellate court's order of affirmance upon proof of mailing to Appellant, but without regard to receipt by or delivery to Appellant, of a copy of the order of affirmance with notice of entry which sets into motion a 30 day limitation of time for taking an appeal, constitutes a denial of Appellant's right to due process as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

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JURISDICTIONAL STATEMENT-- STATE CIVIL CASE

Opinion Below

The opinion and dismissal order of the Court of Appeals entered May 8, 1986, and the order of affirmance of the Appellate Division, Third Department, entered October 11, 1985, are set out in the Appendix hereto. The decision of the Court of Ap-

peals is not yet reported. The case is reported at the Appellate Division as Mareno v. Roberts, 113 A.D.2d 987(1985); 493 N.Y.S.2d 660(1985).

Jurisdiction

This appeal draws in question the validity of Rule 2103, subdivision (b), paragraph 2, of the Civil Practice Law and Rules of the State of New York, on the ground that the statute is repugnant to the due process clause of the fourteenth amendment to the Constitution of the United States when applied to Section 5513, subdivision (a), of the Civil Practice Law and Rules of the State of New York, with which the rule is incongruous. And there can be no question but that an unlimited time frame within which a losing party can prosecute an appeal, such as is accorded the losing party under Section 5513(a) in the absence of notice, is a substantial and valuable property or liberty interest, or both.

The constitutional question is raised on on this appeal for the first time simply because it was not a factor in the case until appellee provoked it in medias res in response to the Court of Appeals' invitation to both parties to respond to its sua sponte inquiry as to its subject matter jurisdiction in the case in the light of recently enacted state legislation restricting the court's "as of right" appellate jurisdiction. And, in responding to appellee's suggestion for dismissal of the appeal by reason of untimeliness, the Court of Appeals appears to have moved decisively away from its earlier holding that Rule 2103(b)2 erected a rebuttable presumption of delivery. See Engel v. Lichterman, 62 N.Y.2d 943(1984); 468 N.E.2d 26 (1984). Accord, Kalman v. Welsh, 32 A.D.2d 1044(1969); 303 N.Y.S.2d 702(1969).

This retreating posture of the Court of Appeals, given the presence in the record of a contested issue of fact as to the delayed

delivery or receipt of notice of entry, sets the stage for this court's examination of the constitutional question vis-a-vis the perceived intent of Section 5513(a) to require the successful party to give actual notice of entry to the losing party in order to shorten the time for prosecution of an appeal. Notice of Appeal to this court was served on the Attorney General of the State of New York who represents the appellee, and timely filed in the Court of Appeals on August 1, 1986.

Jurisdiction to review the decision of the Court of Appeals is conferred upon this court by 28 U.S.C. Section 1257(2). However, appellant is unaware of any decision of this court addressing the issue.

Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 in part as follows: " . . . nor shall

any State deprive any person of life, liberty, or property, without due process of law . . .."

Section 5513(a) of the Civil Practice Law and Rules provides as follows: "An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has entered the judgment or order or served notice of its entry his appeal must be taken within thirty days after he did either.".

Rule 2103(b)2 of the Civil Practice Law and Rules provides in part as follows: " . . . Such service upon an attorney shall be made . . . by mailing the paper to him at the address designated by him for that purpose or, if none is designated, at his last known address; service by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the

exclusive care and custody of the United States post office department within the . state . . . ."

Statement of the Case

Appellant prosecuted an appeal to the Appellate Division, Third Department, from an adverse determination of the Unemployment Insurance Appeal Board as provided for in Article 18 of the Labor Law of the State of New York. On the appeal appellant challenged as a matter of law the revised factual determination made by the Administrative Law Judge on appellant's appeal to the effect that appellant had retired in February, 1983, prior to receipt of benefit payments, on an evidentiary record which had established to the satisfaction of the Local Office that appellant had retired in October, 1983, after receipt of benefit payments.

In affirming the Appeal Board the Ap-

pellate Division did not address this contention or even discuss the operative facts in relation to the contention. Like the Appeal Board before it, the Appellate Division placed its decision on a basis which appellant never made an issue of, namely, rate reduction. However, because the uncontroverted evidence of record brought the case squarely within the ambit of the Court of Appeals holding in Guilfoyle v. Dow Jones & Company, Inc.,30 N.Y.2d 784(1972); 334 N.Y.S.2d 176(1972) on the matter of post-benefit retirement, appellant was desirous of appealing the decision of the Appellate Division to the Court of Appeals.

Upon receipt of a copy of the Appellate Division's Order of Affirmance with Notice of Entry in the mail on February 22, 1986, appellant served his Notice of Appeal the next day. Appellee's counsel furnished the Court of Appeals with an affidavit indicating that Notice of Entry was deposited in the mail addressed to appellant on Novem-

ber 7, 1985, and, accordingly, urged the court to dismiss the appeal.

The Court of Appeals dismissed appellant's appeal sua sponte on the ground of untimeliness subsequent to its receipt of appellant's response indicating that Notice of Entry had been received by appellant on February 22, 1986, in the mail.

The Federal Question is Substantial

The Court of Appeals, in elevating Rule 2103(b)2 above its status as an evidentiary device, has imposed the risk of miscarriage in the mails upon the addressee under circumstances which trammel upon the statutory right of the addressee to receive actual notice of an event that sets into motion a time limit for prosecuting an appeal. At the very least the court's construction renders the expectation of notice under Section 5513(a) an "illusion".

The Constitution has a healthy intoler-

ance for deceptive practices where important personal interests hang in the balance. And that intolerance level has been reached under the facts at bar. It is, indeed, a cruel irony which enables an appellee to abort an appeal made necessary to rectify injury sustained by appellant early on in the case from a fact-finding revision which inurs to appellee's benefit without the requisite cross-appeal to support the revision.

It is said that due process is in substance legal fair play. If such be the case, the facts of this case make a strong bid for the implementation of legal fair play. The decision of the Court of Appeals on this record betrays an anxiety to rid itself of the case, and is impossible to justify on any basis consistent with the fourteenth amendment, and as such, merits swift, summary reversal by this court.

Conclusion

The decision below should be summarily

reversed and the case remanded to the Court of Appeals with directions to continue its subject matter jurisdictional inquiry. Alternatively, this appeal should be accorded plenary review.

Respectfully submitted,

Antonio Mareno
Appellant Pro Se
3505 Tulip Drive
Yorktown Heights, N.Y.
(914) 245- 7582

Dated: August 2, 1986

APPENDIX A

ORDER OF DISMISSAL

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of May A.D. 1986

Present, HON. SOL WACHTLER, Chief Judge, presiding.

- -x

3 Mo. No. 476 SSD 60

In the Matter of Antonio Mareno,
Appellant,

Lillian Roberts, as Commissioner of Labor,
Respondent.

- -x

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, for untimeliness(see Kings Park Classroom Teachers Association v. Kings Park Central School District, 63 NY2d 742).

(Seal)

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B

ORDER OF AFFIRMANCE

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 16th day of August, 1985

PRESENT:

HON. A. FRANKLIN MAHONEY
Presiding Justice

HON. T. PAUL KANE
HON. ROBERT G. MAIN
HON. HOWARD A. LEVINE
HON. NORMAN L. HARVEY
Associate Justices

SAME TITLE Index No. 49875

Claimant having appealed from a decision of the Unemployment Insurance Appeal Board, dated and filed in the Department of Labor, October 22, 1984, and said appeal having been submitted by both parties thereto, during the above stated Term of this Court, and,

after due deliberation, the Court having rendered a decision on the 19th day of September, 1985 it is hereby

ORDERED that the said decision, so appealed from, be and the same hereby is affirmed, without costs.

ENTER:

DATED AND ENTERED: OCT 11 1985

/s/ Michael J. Novack
Clerk

(Seal)

APPENDIX C

NOTICE OF APPEAL

SAME TITLE

No. 49875

S I R :

PLEASE TAKE NOTICE that pursuant to enabling authority in the Labor Law the above named Claimant-Appellant hereby appeals to the Court of Appeals of the State

of New York from the Order of the Appellate Division of the Supreme Court of the State of New York in and for the Third Department, dated and entered herein on October 11, 1985, affirming without costs the Decision of the Unemployment Insurance Appeal Board dated and filed in the Department of Labor on October 22, 1984, and this appeal is taken from each and every part of said Order as well as from the whole thereof.

Dated: February 22, 1986

Yorktown Heights, N.Y.

Yours, etc.

ANTONIO MARENO
Claimant-Appellant
Post Office Address
3505 Tulip Drive
Yorktown Heights, N.Y. 10598
(914) 245- 7582

TO:

ROBERT ABRAMS, Esq.
Attorney for Respondent
2 World Trade Center, Room 5020
New York, New York 10047
(212) 488- 5443

APPENDIX D

JURISDICTIONAL STATEMENT

SAME TITLE

1. The title of the case is In the Matter of The Claim for Benefits under article 18 of the Labor Law made by Antonio Mareno, Claimant-Appellant, against Lillian Roberts, as Commissioner of Labor, Respondent.

2. The appeal is taken from an order of the Appellate Division, Third Department.

3. The notice of appeal was served by mail on February 23, 1986, and filed on February 26, 1986.

4. The order appealed from with notice of entry was served by mail on the appellant on February 22, 1986.

5. Respondent's attorney is Robert Abrams, Esq., whose office address is 2 World Trade Center, Room 5020, New York,

New York 10047, and whose telephone number is (212) 488- 5443.

6. The controversy in this case involves the factual determination of the Unemployment Insurance Appeal Board vis-a-vis the record evidence as to the nature of the employment termination event which occurred on February 16, 1983, and which ended claimant's employment as a Law Assistant in the United States Court of International Trade in New York City.

Claimant contends, and the Local Office found from the evidence, that claimant was involuntarily separated from employment on February 16, 1983, and the benefits in dispute were paid on the basis of this factual determination. However, on the occasion for rate reduction which subsequently occurred by reason of claimant's retirement in October, 1983, after near exhaustion of supplemental benefit allowances, the Local

Office sought recovery of these benefits from claimant when it learned that claimant had received in October, 1983 following retirement adjudication "retroactive payment of remuneration in the form of pension", to use the Local Office's phrasing.

To support the Local Office's determination in this regard at the time of rate reduction the Appeal Board disaffirmed, as did the Administrative Law Judge before it, the Local Office's factual finding that claimant had been involuntarily separated from employment, and summarily determined that claimant had been involuntarily retired by his employer on February 16, 1983, and this, while excluding from the administrative record the only circumstance of the employer's involvement in fact-finding on this critical issue, namely, the employer's response to claimant's initial application for benefits in February, 1983.

The revised factual determination of

the Appeal Board is in error on the record before it because the Local Office's factual finding to the effect that claimant was involuntarily separated from employment which survived its rate reduction determination was conclusive against the Commissioner who did not appeal the Local Office's determinations, and could not be revised on claimant's appeal consistent with due process guarantees. Thus, the Local Office's determination respecting benefit overpayment rests solely on a foundation which conflicts with paragraph (c) of subsection 2 of section 517 of the Labor Law which excludes pension payments from the ambit of the term "remuneration".

Section 624 of the Labor Law confers jurisdiction upon this court to hear appeals from determinations made in the Appellate Division, Third Department, under Article 18 of the Labor Law irrespective of the form or substance of the determinations appealed

from. And, as further support for this court's jurisdiction, is the preemptive holding of this court in Guilfoyle v. Dow Jones & Company, Inc., 30 N.Y.2d 784(1972) on the issue "whether(claimant) retired at the time of the termination of his employment with(U. S. Court of International Trade)". Accord, Hiken v. Levine, 40 A.D.2d 927(1972).

The issues likely to be raised on this appeal are: Point I - THE APPEAL BOARD ERRED IN ADOPTING THE ADMINISTRATIVE LAW JUDGE'S FACTUAL FINDING RELATIVE TO THE NATURE OF THE EMPLOYMENT TERMINATION ACTION AFFECTING CLAIMANT.

Point II - AS A PREDICATE FOR ADJUDICATING AN OVERPAYMENT ON THE OCCASION FOR RATE REDUCTION, SECTION 600.7 OF THE LABOR LAW APPLIES TO THE CONCURRENT RECEIPT OF PERIODIC PENSION PAYMENTS AND BENEFIT PAYMENTS IN THAT ORDER BY A CLAIMANT, AND NOT TO THE CONSECUTIVE RECEIPT OF BENEFIT PAYMENTS AND

PERIODIC PENSION PAYMENTS IN THAT ORDER BY A CLAIMANT.

Other issues may also be raised in appellant's brief.

Dated: Yorktown Heights, N.Y.

March 6, 1986

ANTONIO MARENO
Appellant Pro Se
3505 Tulip Drive
Yorktown Heights, N.Y. 10598
(914) 245- 7582

(Attachments Omitted)

APPENDIX E

CLERK'S LETTER TO APPELLANT

March 10, 1986

Mr. Antonio Mareno
3505 Tulip Drive
Yorktown Heights, New York 10598

Re: Mareno v. Roberts

Dear Mr. Mareno:

The Court has received your 500.2 jurisdictional statement and may examine its subject matter jurisdiction sua sponte with

respect to whether an appeal lies as of right under CPLR 5601, as amended effective January 1, 1986(Laws of 1985, ch. 300).

After January 1, 1986, in a civil case, no appeal lies as of right to the Court of Appeals absent a dissent by at least two Appellate Division justices or the direct involvement of a substantial constitutional question.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persevere in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments

justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

If this sua sponte inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for normal perfecting of the appeal.

Very truly yours,

/s/ Donald M. Sheraw

Donald M. Sheraw

JPA:pk
cc: Hon. Robert Abrams

APPENDIX F

APPELLANT'S LETTER TO COURT

March 19, 1986

Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: In re Mareno v. Roberts

Honorable Sirs:

In response to the court's invitation to comment on the matter of "retention of

subject matter jurisdiction" contained in the letter of the clerk dated March 10, 1986, I submit the following:

Two things come to mind when contemplating the changes wrought by Chapter 300 of the Laws of 1985 upon CPLR 5601(a) vis-a-vis judicial review of administrative determinations in unemployment insurance cases. First, section 5601(a) affects appeals in civil actions. Secondly, proceedings under Article 18 of the Labor Law are not civil actions, and draw minimally upon procedure governing the prosecution of civil actions, inclusive of appeals.

Article 18 provides a complete and efficacious procedure, inclusive of judicial review, for all parties affected by the administration of the unemployment insurance law, i.e., claimant, employer, commissioner of labor. With respect to appeals, section 624 of the Labor Law provides first,

for a summary, as distinguished from a plenary, appeal to the Appellate Division, Third Department, and then, for a second appeal to the Court of Appeals, drawing upon the CPLR only residually in language which states, "An appeal may be taken from the decision of such court to the court of appeals in the same manner and subject to the same limitations, not inconsistent herewith, as is provided for in civil action."

Since the "of right" appeal limitations of section 5601(a) are inconsistent with the "of right" appeal provision in section 624, the former provision is preempted by the latter provision. Cf. Claims of DiMartino, 59 N.Y.2d 638(1983).* And, in the absence of the removal of the language "not inconsistent herewith" from section 624 with the enactment of Chapter 300 of the Laws of 1985, it is doubtful that the legislature intended to strip Article 18 litigants of appellate parity with civil litigants, and thus navigate into choppy, con-

stitutional waters - given the universal need of litigants for recourse to at least one plenary appeal as of right.

Respectfully submitted,

/s/ Antonio Mareno

ANTONIO MARENO
Appellant Pro Se
3505 Tulip Drive
Yorktown Heights, N.Y. 10598
(914) 245- 7582

cc.:
Robert Abrams, Esq.

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* On Article 18 appeals to the Court of Appeals no significance is attached to the decisional posture of the Appellate Division judges. Sierant v. Catherwood, 24 N.Y.2d 675(1969).

APPENDIX G

RESPONDENT'S LETTER TO CLERK

March 18, 1986

Honorable Donald M. Sheraw
Clerk
Court of Appeals
Eagle Street
Albany, New York 12207

Re: Matter of Antonio Mareno v. Lillian Roberts as Commissioner of Labor

Dear Mr. Sheraw:

We are in receipt of a notice of appeal dated February 22, 1986 and a jurisdictional statement dated March 6, 1986 from Mr. Mareno in the above captioned case.

This is to advise the Court that Mr. Mareno, who lost his appeal to the Appellate Division Third Department from an adverse Unemployment Insurance Appeal Board decision has filed an untimely notice of appeal to this Court. Mr. Mareno was served with an order of affirmance and notice of entry on November 7, 1985 several months before his notice of appeal was filed. We enclose herewith copies of the relevant documents.

Under the circumstances claimant's purported appeal as of right should be dismissed without further review.

Very truly yours,

/s/ Iris A. Steel

IRIS A. STEEL
Assistant Attorney General

IAS:cs
Encl.

cc: Antonio Mareno
3505 Tulip Drive
Yorktown Heights, NY 10598

(Enclosure)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Corrine Mauldin, being duly sworn, says: I am employed in the office of ROBERT ABRAMS, Attorney General of the State of New York, the attorney for Commissioner of Labor Respondent herein and am over the age of 18 years. On November 7, 1985 I served the within Order of Affirmance with Notice of Entry upon the following named person:

Antonio Mareno
3505 Tulip Drive
Yorktown Heights, NY 10598

by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at One World Trade

Center, New York, New York 10048 directed to said person at the address indicated above that being the address designated by him for that purpose.

/s/ Corrine Mauldin

Sworn to before me this
7th day of November, 1985

/s/ Steven Koton
Assistant Attorney General
of the State of New York

(Other Enclosures Omitted)

APPENDIX H

APPELLANT'S LETTER TO CLERK

March 21, 1986

Mr. Donald M. Sheraw
Clerk, Court of Appeals
Eagle Street
Albany, New York 12207

Re: In re Mareno v. Roberts

Honorable Sir:

I am in receipt of a copy of Assistant Attorney General Steel's letter to you under date of March 18, 1986. Since the Assistant Attorney General did not furnish me

with a copy of the "relevant documents" I cannot respond to them.

However, I do know that I received a copy of the Order of Affirmance with Notice of Entry in the mail on February 22, 1986, and that I promptly served my Notice of Appeal the next day. You will note from the envelope in which the Notice of Entry was received that there is no postmark on the envelope, in sharp contrast to the envelope in which the Assistant Attorney General's letter copy of March 18th was mailed to me from the same office(photostats enclosed).

Absent a postmark on the Notice of Entry envelope there appears to be no way to determine when the sealed envelope entered the postal system. However, it wouldn't be the first time that a mailed Notice of Entry has gone astray without the dire consequences the Assistant Attorney General seeks. Cf. Kalman v. Welsh, 32 A.D.2d 1044(1969).

Moreover, if the Notice of Entry entered the postal system as early as the Assistant Attorney General contends, it is highly unlikely that the Appeal Board would have waited until after I served my Notice of Appeal to enter a final judgment on March 7, 1986 pursuant to section 624 of the Labor Law. The Board would have done this months earlier(photostat enclosed).

Respectfully yours,

ANTONIO MARENO
3505 Tulip Drive
Yorktown Heights, N.Y. 10598
(914) 245- 7582

Enc./
cc(with enclosures): Iris A. Steel
Assistant Attorney General

(Enclosures Omitted)